No. 03-1602

IN THE SUPREME COURT OF THE UNITED STATES

ARTICHOKE JOE'S,
CALIFORNIA GRAND CASINO, ET AL.,

Petitioners,

v.

GALE A. NORTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. The Solicitor General does not gainsay that this case involves issues of national legal and societal importance, for indeed it does. The Ninth Circuit, in the first such federal appellate ruling, has allowed a state to carve out a six billion dollar a year business -- Class III casino gaming -- exclusively for Indian tribes. This ruling has obvious relevance to other states. A recent comprehensive study, cited by the California Respondents, states that in 2003 "[t]here were 22 states with Class III [tribal] gaming facilities and eight states with Class II [tribal] gaming facilities or [the] equivalent ...."[1] Of the 22 states having Class III tribal casinos, only eight allow Class III non-tribal commercial casinos.[2] Of the eight having Class II tribal casinos, none allows Class II non-tribal commercial casinos.[3]

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[1] Alan Meister, Ph.D., *Indian Gaming Industry Report* 7 (Analysis Group, Inc. July 2004) (not publicly available when the petition for certiorari was filed).

[2] Non-tribal Class III commercial casinos are made illegal by the following state statutes: Ariz. Rev. Stat. §§ 13-3303, 13-3304, 13-3305; Cal. Penal Code §§ 330-337z; Conn. Gen. Stat. § 53-278b; Idaho Code §§ 18-3802, 18-3809; Kan. Stat. Ann. §§ 21-4303, 21-4304, 21-4305; Minn. Stat. § 609.755; N.M. Stat. Ann. §§ 30-19-2, 30-19-3, 30-19-4; N.Y. Penal Law §§ 225.05, 225.10; N.C. Gen. Stat. §§ 14-292, 14-295; N.D. Cent. Code § 12.1-28-02; Or. Rev. Stat. §§ 167.122, 167.127; Tex. Penal Code Ann. §§ 47.02, 47.03, 47.04; Wash. Rev. Code §§ 9.46.220, 9.46.221, 9.46.222; Wis. Stat. §§ 945.02, 945.03, 945.04. Connecticut, a major tribal gaming state, no longer permits even charitable Class III gaming. *See* 2003 Conn. Pub. Acts 03-1. The legality of existing tribal Class III gaming in Florida and Texas is contested.

[3] Non-tribal Class II casinos are made illegal by the following state statutes: Ala. Code §§ 13A-12-21, 13A-12-22; Alaska Stat. §§ 11.66.200, 11.66.210, 11.66.220; Fla. Stat. chs. 849.01, 849.08; Me. Rev. Stat. Ann. tit. 17-A, §§ 952, 953, 954; Neb. Rev. Stat. §§ 28-1102, 28-

The Ninth Circuit's statutory and constitutional rulings clearly are pertinent to the situations in other states where differential treatment of Indians and non-Indians already exists.

That this case raises issues of national legal and societal importance is underscored by five compacts with tribes recently signed by California's Governor. *See* John M. Broder, *More Slot Machines for Tribes; $1 Billion for California*, N.Y. Times, June 21, 2004, at A1. These compacts provide the five tribes exclusive Class III gaming rights, including unlimited slot machines, in their operating areas until 2030. *See* Press Release, Office of the Governor, Governor Schwarzenegger Signs Re-Negotiated Gaming Compacts with Five Indian Tribes (June 21, 2004) (available at http://www.governor.ca.gov). Legislation ratifying these compacts gives each tribe the right to enjoin state-sanctioned Class III gaming by non-Indians in their operating areas.[4] A.B. 687, 2003-04 Leg., Reg. Sess. (Cal. 2004) (passed July 1, 2004). In exchange, the five tribes have promised to support a bond initiative that immediately would bring $1 billion to the state and have committed to paying hundreds of millions more to the state in the future. Broder, *supra*. The Governor expressly has stated that the new compacts are intended "to deal with the fiscal crisis of California." Governor Arnold Schwarzenegger, Opening Remarks at Compact Signing Ceremony (June 21, 2004) (transcript available at http://www.governor.ca.gov).

1103, 28-1104; Okla. Stat. tit. 21, § 941; S.C. Code Ann. §§ 16-19-40, 16-19-50; Wyo. Stat. Ann. § 6-7-102.

[4] These compacts have not yet been approved by the Secretary of the Interior.

California's recent actions bring into clear focus the far-reaching ramifications of allowing tribes a Class III monopoly. California has extended and expanded tribal monopoly rights in return for monetary help needed to address the dire straits in which the state finds itself. A recent Ninth Circuit ruling sanctions a state's requiring significant payments as a condition for a tribal monopoly,[5] and it is thus likely that such monopolies will spread as states seek to replenish depleted coffers.

2. The court of appeals held that Proposition 1A passes equal protection review under the specialized test enunciated in *Morton v. Mancari*, 417 U.S. 535, 555 (1974), which allows tribal preferences that are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." However, while Congress may enact legislation singling out tribal Indians "that might otherwise be constitutionally offensive....[,] States do not enjoy this same unique relationship with Indians." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979). In that case, which is this Court's leading pertinent authority and on which Respondents heavily rely, the Court approved a state law "enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians" where the state "was legislating under explicit authority granted by Congress." Id. (emphasis added). *Yakima* teaches that, unless Congress has "explicitly authorized" a state to enact a tribal preference, the preference is subject to strict scrutiny. *See, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

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[5] *See In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003). *But see*, 25 U.S.C. § 2710(d)(4)(C).

The salient issue in this regard is not whether Congress in IGRA "intended to bar" state creation of tribal monopolies or to "limit states' authority and flexibility."[6] The issue is whether Congress explicitly authorized the states to enact "legislation singling out tribal Indians ... that might otherwise be constitutionally offensive." *Yakima*, 439 U.S. at 500-01. But no such "explicit authority" can be found in IGRA, which the court of appeals concluded was ambiguous, or in its legislative history, which that court found "silent on the specific issue of tribal monopolies on class III gaming," a finding in which the Solicitor General concurs. Fed. Br.15 (quoting Pet. App. 26a). Accordingly, Proposition 1A is subject to strict scrutiny, which no one contends it could pass.[7]

3. As said, the Court is confronted with a statute that the court of appeals held ambiguous on its face, and legislative history that is "silent" as to tribal monopolies. But had Congress intended to allow California to create a tribal monopoly for a major portion of its economy, one would expect Congress to have made a "clear statement" of such intent. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). An ambiguous statute, backed by "silent" legislative history, is not such a clear statement, absent which IGRA should not be interpreted to allow tribal exclusivity.

The Solicitor General wrongly leaves the impression that the "clear statement" rule applies only where there are

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[6] Fed. Br. 13, 16; State Br. 18 (quoting district court opinion, Pet. App. 128a-129a).

[7] Moreover, if a state statute allowing a tribal monopoly is not authorized by IGRA, which preempts the field, *United Keetoowah Band of Cherokee Indians v. State of Oklahoma ex rel. Moss*, 927 F.2d 1170, 1176 (10th Cir. 1991), that statute violates the Supremacy Clause.

serious constitutional doubts. Fed. Br. 18. To the contrary, this Court "has tended to create the strongest clear statement rules to confine Congress's power in areas in which Congress has the constitutional power to do virtually anything." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299 n.10 (2001) (quoting William S. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 597 (1992)).

If Congress has the constitutional power to authorize a tribal monopoly in any economic area merely to support tribal welfare and sovereignty, then this is indeed an area where Congress has constitutional power "to do virtually anything." But particularly given the "traditionally sensitive" nature of ethnic discrimination, the "clear statement" rule "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved." *I.N.S. v. St. Cyr*, 533 U.S. at 299 n.10 (quoting *Gregory v. Ashcroft*, 501 U.S. at 461). As the court of appeals found, Congress has not done so here, and the clear statement rule thus precludes a finding that Congress has authorized a state-created tribal monopoly.

4. Respondents argue that the "plain text" of IGRA grants authority to create tribal gaming monopolies (State Br. 17; Fed. Br. 8-9), disagreeing with the court of appeals, which found ambiguity. Pet. App. 20a. While we submit that the plain text denies such authority,[8] at the least the statute is ambiguous.

The Solicitor General argues that IGRA's language is "plain" because it authorizes tribal-state Class III gaming

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[8] We also submit that the legislative history plainly shows that Congress did not intend to authorize tribal casino monopolies. *See* Pet. 14-17.

compacts where the state permits "any ... entity" to engage in such gaming. Fed. Br. 9 (quoting 25 U.S.C. § 2710(d)(1)(B)) (emphasis added by Solicitor General). But the court of appeals concluded that "there is nothing in the text itself that definitively resolves whether Congress intended Indian tribes to fall within the scope of 'any person, organization, or entity' under [§ 2710(d)(1)(B)]." Pet. App. 20a. That court's view is supported by this Court's recent decision in *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555, 1561 (2004), which held that, in a statute using the term "any entity," the word "any" does not require "entity" to be construed in its broadest possible sense, if a narrower construction is indicated by the remainder of the statute and other considerations. [9]

The court of appeals also found IGRA's use of the term "permit" to be "susceptible to more than one interpretation." Pet. App. 20a. Given IGRA's parallel requirement that slot machines be "legal" in the state, 25 U.S.C. § 2710(d)(6), the term "permit" reasonably may be read to refer to state action concerning activities as to which the state may enact laws. A state, however, has no jurisdiction on its own to enact laws permitting Class III gaming only on Indian lands.

The Solicitor General disputes the premise that a state, acting alone, lacks authority to permit Class III gaming only on Indian land. Fed. Br. 10-11. He contends that after IGRA California could "permit" such tribal gaming by not enacting a general prohibition of such gaming or by "not extending it to Indian lands."

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[9] Contrary to the state's assertion (State Br. 17), we have never contended that "any person" means "every person" and that no tribal Class III gaming is permissible unless everyone in the state, regardless of location or qualifications, may engage in such gaming.

California, of course, could permit Class III tribal gaming by not enacting a general prohibition against it, for this would mean that others in the state could conduct such gaming and IGRA's permit requirement would be satisfied. But the statement that the state could "permit" Class III gaming by "not extending" a general prohibition against it to Indian lands is wholly in error. As the district court found, "[o]utside ... IGRA, California cannot unilaterally legalize tribal gaming." Pet. App. 118a. *See also*, *id.* 119a. IGRA preempts the field, *United Keetoowah Band of Cherokee Indians v. State of Oklahoma ex rel. Moss*, 927 F.2d 1170, 1176 (10th Cir. 1991), and a state cannot allow tribal Class III gaming unless it operates within IGRA's confines. But surely the IGRA provision the Solicitor General cites -- 18 U.S.C. § 1166 -- does not give a state authority to permit Class III gaming only on Indian lands. That statute on its face does not apply to Class III compact gaming. *See*, 18 U.S.C. § 1166(c)(2). Moreover, it provides that state laws concerning gaming may apply to Indian land only "in the same manner and to the same extent as such laws apply elsewhere in the state." 18 U.S.C. §1166(a).

Respondents contend that the law authorizing the compacts (Proposition 1A) itself constitutes state "permission." But that interpretation is suspect as a matter of "plain text," because it would mean that any tribal gaming under a compact authorized by state law is *ipso facto* "permitted" by the State. At the very least, it is reasonable to interpret the Act to establish "state permission" as a requirement that is independent of the tribal-state compact requirement, and that consequently is not fulfilled any time a state adopts a law like Proposition 1A authorizing compacts, which must be in effect to fulfill the "compact" requirement. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1554-55 (10th Cir. 1997).

5. There is at least a serious question whether Proposition 1A and the compacts are constitutional. As noted, IGRA does not "explicitly authorize" a tribal monopoly, as *Yakima* requires. Moreover, "Congress' unique obligations toward the Indians" does not justify giving only tribes a $6 billion dollar slice of California's economy. Both *Mancari*, 417 U.S. at 554-55, and *Rice v. Cayetano*, 528 U.S. 495, 520 (2000) recognize that the preferences allowed by *Mancari* are "limited." But if a state totally may exclude non-Indians from a generic business activity in the name of tribal preferences, there are no recognizable limits.

The presence of such serious constitutional questions requires interpreting IGRA to avoid them and thus to disallow a tribal monopoly. This rule of construction trumps any application of the Indian canon. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001).[10]

The Solicitor General contends that Congress unquestionably could pass a federal law authorizing tribes to conduct Class III gaming on Indian land, regardless of state law. Thus, he argues, Congress can pass a law giving states a voice in the matter, irrespective of whether a state allows Class III gaming elsewhere. Fed. Br. 20-21.

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[10] The Solicitor General and the state also invoke the *Chevron* deference rule. But such deference normally is required to enable the agency to "reconcil[e] conflicting policies" and make "reasonable policy choice[s]." *Chevron, U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844, 845 (1984). In approving the California compacts, the Secretary did not do that; instead, she relied exclusively on IGRA's "plain meaning." (Excerpts of Record at 36.) "[A]n agency's conclusion that a particular course is compelled by a statute that is actually ambiguous does not display the caliber of reasoned decision making necessary to warrant *Chevron* step two deference." *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 740 (D.C. Cir. 1990).

This is a non sequitur. A federal law allowing gaming on reservations regardless of state law would not present an equal protection issue, because no discrimination is involved where federal and state law differ. *United States v. Antelope*, 430 U.S. 641 (1977). But if, acting under federal law, a state prescribes one rule for tribes and another rule for everyone else, equal protection is implicated, because that constitutes official ethnic discrimination by a single government. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The Solicitor General endorses the court of appeals' view that it is rational for the state "to recognize the separate sovereign interests of the tribes and to allow the tribes to make a different moral and economic choice than is made by the State as a whole." Fed. Br. 23 (quoting Pet. App. 55a-56a). But tribal sovereignty is not a sufficient basis for California's discriminatory action, because that discrimination involves not only what the tribes may do on Indian land, but also what others may not do anywhere else in the state. Indeed, California law now gives tribes signing new compacts the right to enjoin non-Indian competitors operating outside the reservations. This preference, which intrudes into the state's general economy, cannot be justified by the goal of tribal sovereignty over Indian land.

The Solicitor General also argues that the state has made a "legitimate choice" to "confine[] [gaming] to Indian land." Fed. Br. 20. But Proposition 1A is not a zoning measure limited to where Class III gaming may be conducted. Rather, it also prescribes who may conduct such gaming. California clearly has authority to enact zoning measures limiting the locations where Class III gaming may be conducted. But such restrictions may not be based on ethnicity, because so doing raises serious equal protection concerns.

The Solicitor General also supports the court of appeals' view that the "vice" nature of gambling renders it particularly appropriate for a tribal monopoly. Fed. Br. 23-24. But he does not explain how a vice activity monopoly relates to "Congress' unique obligations toward the Indians," but a monopoly as to other business enterprises would not. Nor does he justify the state's use of ethnic qualifications in the exercise of its police power to restrict vice activities.

At bottom, there is no precedent allowing a state-wide Indian monopoly of an economic activity that has no connection to tribes other than its ability to generate enormous revenue. Such a monopoly far exceeds the "limited" preferences allowed by *Mancari*.

CONCLUSION

Before tribal monopolies become an entrenched feature of American economic life, this Court should examine the serious, far-reaching statutory and constitutional issues raised by the petition for certiorari, which should be granted.

Respectfully submitted,

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